

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO**

In the Matter of)	Case No. 04-O-11779-PEM;
)	04-O-12481 (Cons.)
MARTA KEMPTON,)	
)	DECISION AND ORDER SEALING
Member No. 129035,)	DOCUMENTS
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

After respondent **Marta Kempton** reached a Stipulation as to Facts and Conclusions of Law (stipulation) with the Office of the Chief Trial Counsel of the State Bar of California (State Bar), this court approved the stipulation and accepted respondent as a participant in the State Bar Court's Alternative Discipline Program (ADP).¹ (Rules Proc. of State Bar, rules 800-807.)

As set forth below in greater detail, respondent has successfully completed the ADP. Accordingly, pursuant to rule 803 of the Rules of Procedure of the State Bar of California,² the court hereby recommends that respondent be suspended from the practice of law for one year, that execution be stayed, and that respondent be placed on probation for three years with specified conditions, including an actual suspension of 60 days. At the same time, because respondent was placed on inactive status from November 27, 2006 through January 25, 2007 (60 days), she would receive credit for the period of inactive enrollment towards any period of actual suspension to be imposed by the Supreme Court. (Bus. & Prof. Code, § 6233.)

¹Also known as the State Bar Court's Program for Respondents with Substance Abuse and Mental Health Issues.

²References to rule are to the Rules of Procedure of the State Bar, unless otherwise noted.

II. Significant Procedural History

On July 23, 2004, the State Bar filed a notice of disciplinary charges. Respondent filed a response on August 10, 2004.

Following discussions at a settlement conference, respondent's case was referred to the ADP to evaluate whether respondent met the requirements for participation in the program. A prerequisite to participation in the ADP is an attorney's acceptance in the State Bar Lawyer Assistance Program (LAP). (Rules Proc. of State Bar, rule 802(a).) Accordingly, respondent also was required to contact the LAP and determine if she wanted to enroll in that program. On February 14, 2005, after an extensive evaluation process, respondent entered into a five-year participation agreement with the LAP to assist in her recovery process from her bipolar, hyperactive disorder, bipolar II, hypomania, as well as her lack of impulse control.

On July 11, 2005, the parties submitted the stipulation for purposes of respondent's participation in the ADP. (Rules Proc. of State Bar, rule 802(a).) At the same time, this court issued its Decision Re Alternative Recommendations for Degree of Discipline (July 2005 Decision) pursuant to rule 803(a). After considering the court's disciplinary recommendations, respondent elected to participate in the ADP. Following the execution of a Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program (contract), this court accepted respondent into the ADP on July 11, 2005.

Under the terms of the contract and the July 2005 Decision, respondent may elect to serve, if she was in full compliance with the conditions of the ADP, the recommended level of discipline of 60 days actual suspension during her participation in the ADP. In November 2006, respondent requested to be enrolled as an inactive member of the State Bar for 60 days under Business and Professions Code section 6233. By order of the court, she was then placed on inactive status from November 27, 2006 through January 25, 2007. Thus, she would receive credit for the period of her inactive enrollment towards any period of actual suspension to be imposed by the Supreme Court. (Bus. & Prof. Code, § 6233.)

On July 9, 2007, this court found that respondent successfully completed the ADP and ordered that the stipulation be filed. The court indicated that it would issue this decision

recommending the lower level of discipline reflected in the July 2005 Decision.

III. Findings of Fact and Conclusions of Law

The Stipulation Re Facts and Conclusions of Law (stipulation) approved by the court and filed on July 9, 2007, is incorporated by reference as if set forth fully herein.

In the stipulation, respondent admitted to committing acts of moral turpitude and dishonesty in violation of Business and Professions Code section 6106 in two matters. In summary, respondent in January 2004 applied for a mortgage loan and in support of her application for the loan submitted false documents. In addition, respondent submitted false documents to California State University in support of a fellowship program. Respondent admitted that in both instances she knowingly submitted false documents.

In aggravation, respondent stipulated that her misconduct evidences multiple acts of misconduct. (Rules Proc of State Bar, tit. IV, Stds. For Atty. Sanctions for Prof. Misconduct, standard 1.2(b)(ii).)³

In mitigation, respondent has no record of prior discipline in about 17 years of practice prior to the commencement of the misconduct upon which this proceeding is based. Such a lengthy period of practice without prior discipline is entitled to significant weight as a mitigating factor. (Standard 1.2(e)(i).)

Respondent was candid and cooperative with the State Bar during the investigation and resolution of these matters. (Std. 1.2(e)(v).)

At the time of the misconduct, respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable and beyond her control.

Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of her misconduct. Respondent made full restitution to the loan company before the intervention of the State Bar. Also, respondent recognizes the wrongfulness of her conduct and has taken steps to address the underlying emotional difficulties that have contributed to her misconduct. (Std.

³All further references to standards are to this source.

1.2(e)(vii.)

In September 2004, respondent contacted LAP and completed the intake process. On October 6, 2004, respondent signed an application agreement to be considered by LAP for long-term participation. Respondent cooperated with that assessment process, and entered into the long-term participation plan on February 14, 2005. She has remained in full compliance with LAP since her first contact with the program. Her participation requirements included attending weekly LAP group meetings and participating in individual therapy.

The psychological evaluation report of Philip Keddy, Ph.D., dated December 17, 2004, supported the conclusion that at the time of her prior misconduct, respondent was suffering from bipolar, hyperactive disorder, bipolar II, hypomania, as well as the lack of impulse control. Respondent experienced extreme turmoil and financial difficulties due to her parent's serious illness, her nephew's suicide and her brother's lay-off from employment. As a consequence, respondent experienced a "triggering effect" of her bipolar, hyperactive disorder diagnosed in 1997-1998. Respondent then abused alcohol and painkillers and experienced intensive lack of impulse control that caused the charged misconduct.

On January 22, 2007, the LAP submitted to the court for respondent a Certificate of One Year Participation in the Lawyer Assistance Program (Certificate). (Rules Proc. of State Bar, rule 804.) The Certificate from a mental health professional confirms that respondent has complied with all requirements set forth in her LAP Participation Agreement/Plan for at least one year and has maintained mental health stability during this period.

In addition to participating in LAP, respondent was accepted into the ADP as a result of her misconduct in this matter. Respondent fully complied with all terms and conditions of the program.

Rule 804 provides that a respondent must participate in the ADP for a period of 36 months, and that the court may shorten the time to not less than 18 months with earned incentives. Based on her compliance with all aspects of her recovery program, the court found it appropriate to reduce the length of time that respondent was required to participate in the ADP from 36 months to 24 months. Accordingly, on July 9, 2007, the court found that respondent successfully completed the ADP.

Respondent is entitled to significant mitigating credit for her participation in LAP and her

successful completion of the ADP.

IV. Degree of Discipline

In determining the appropriate disposition in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession and maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; Standard 1.3.) Standard 1.6(b) provides that the specific discipline for a particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

The State Bar recommended that if respondent successfully completes the ADP, she should be actually suspended for 90 days. Respondent recommended that she be privately reprimanded with 18 months probation if she successfully completes the ADP.

The court finds *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332 and *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269 to be instructive.

In *Mitchell*, the attorney was suspended for one year, stayed, with probation for one year and 60 days actual suspension for misrepresenting his educational background on his resume. In mitigation, the attorney testified that his concern for his wife and unborn child and his ability to support them clouded his judgment and conceivably, was directly responsible for some of his misconduct. In aggravation, he committed multiple acts of wrongdoing and misrepresented to the State Bar during the discovery phase.

In *Dahlz*, respondent was found culpable, in one client matter, of failing to perform and communicate, improperly withdrawing from representation and committing an act of moral turpitude, namely misrepresenting to an insurance adjuster that his client no longer wanted to pursue her claim. In aggravation, the court found multiple acts of misconduct, one prior instance of discipline, client harm and lack of candor toward the court and the State Bar investigator. The lack of candor was “more egregious than the misconduct found against him in this proceeding.” (*In the Matter of Dahlz, supra*, 4 Cal. State Bar Ct. Rptr. 269, 282.) It included presenting a false telephone

log entry prepared for purposes of trial; presenting to the State Bar investigator a falsified stipulation purporting to resolve his client's case; and misrepresenting to the investigator that he appeared before a Workers' Compensation Appeals Board judge at the time his client's claim was settled. In mitigation, the court afforded slight weight to *pro bono* services rendered because his involvement was not great and was remote in time. Discipline consisted of stayed suspension for four years and until he complied with standard 1.4(c)(ii) and four years probation on conditions including one year actual suspension.

It is well settled that "any act of dishonesty by an attorney is an act of moral turpitude, and ground for serious professional misconduct, whether or not arising in the course of attorney-client relations." (*In the Matter of Mitchell, supra*, 1 Cal. State Bar Ct. Rptr. at p. 341.)

Upon consideration of the Review Department precedent set forth above, the court concludes respondent's recommendation of a private reproof is not adequate. But the court rejects State Bar's recommendation for the level of actual suspension.

Supreme Court and Review Department case law establish that extreme emotional difficulties are a mitigating factor where expert testimony establishes that those emotional difficulties were directly responsible for the misconduct, provided that the attorney has also established, through clear and convincing evidence, that he or she no longer suffers from such difficulties. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 527; *In re Naney* (1990) 51 Cal.3d 186, 197; *In re Lamb* (1989) 49 Cal.3d 239, 246; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.)

However, the Supreme Court has also held that, absent a finding of rehabilitation, emotional problems are not considered to be a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney, supra*, 51 Cal.3d at p. 197.)

Additionally, Supreme Court case law establishes that an attorney's rehabilitation from alcoholism or other substance abuse problems can be accorded significant mitigating weight if it is established that (1) the abuse was addictive in nature; (2) the abuse causally contributed to the misconduct; and (3) the attorney has undergone a meaningful and sustained period of rehabilitation. (*Hartford v. State Bar* (1990) 52 Cal.3d 93, 101; *In re Billings* (1990) 50 Cal.3d 358, 367.)

Dr. Keddy's expert evaluation established that respondent had both mental health issues and

substance abuse problems that causally contributed to her misconduct.

Respondent's successful completion of the ADP, which required her compliance with all provisions and conditions of her Participation Agreement with the LAP, qualifies as clear and convincing evidence of her rehabilitation from her emotional problems, bipolar, hyperactive disorder, bipolar II, hypomania, as well as the lack of impulse control. She has demonstrated that she has undergone a meaningful and sustained period of rehabilitation from chemical dependency.

In light of the facts and circumstances surrounding respondent's misconduct, the mitigating and aggravating factors and the analogous case law, the court concludes that a one-year stayed suspension and a three-year probation with an actual suspension of 60 days is appropriate.

V. Recommendation

IT IS HEREBY RECOMMENDED that respondent **Marta Kempton** be suspended for one year, that execution of such suspension be stayed, and that respondent be placed on probation for a period of three years on the following conditions:

1. Respondent must be actually suspended from the practice of law for the first 60 days of the period of probation, with credit toward the period of actual suspension given for the period of inactive enrollment which commenced on November 27, 2006;
2. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;
3. Within 10 calendar days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including her current office address and telephone number, respondent must report such change in writing to both the Office of Probation and to the Membership Records Office of the State Bar;
4. Respondent must comply with all provisions and conditions of her Participation Agreement with the Lawyer Assistance Program (LAP) and must provide an appropriate waiver authorizing the LAP to provide the Office of Probation and this Court with information regarding the terms and conditions of respondent's participation in the LAP and her compliance with LAP requirements. Revocation of the written waiver for release of LAP

information is a violation of this condition;

5. Respondent must submit written quarterly reports to the Office of Probation no later than each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, respondent must state whether she has complied with the State Bar Act, the Rules of Professional Conduct, and these probation conditions during the preceding calendar quarter. If the first report will cover less than 30 days, that report must be submitted on the reporting due date for the next calendar quarter and must cover the extended period. In addition to all quarterly reports, respondent must submit a final report, containing the same information required by the quarterly reports. The final report must be submitted no earlier than 20 days before the last day of the probation period and no later than the last day of said period;
6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation which are directed to respondent personally or in writing, relating to whether she is complying or has complied with these probation conditions;
7. Within one year of the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent must provide to the Office of Probation satisfactory proof of her attendance at a session of State Bar Ethics School, and of her passage of the test given at the end of that session;
8. The period of probation will commence on the effective date of the Supreme Court's final disciplinary order in this proceeding; and
9. At the expiration of the period of this probation, if respondent has complied with all the terms and conditions of probation, the order of the Supreme Court suspending respondent from the practice of law for one year, which was stayed, will be satisfied and that suspension will be terminated.

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE), administered by the National Conference of Bar Examiners, and to provide proof of passage of the MPRE to the Office of Probation, within one year

of the effective date of the Supreme Court's final disciplinary order in this proceeding. Failure to pass the MPRE, and to provide proof of such passage, within the specified time will result in actual suspension by the State Bar Court Review Department, without further hearing, until respondent provides the required proof of passage of the MPRE.

It is further recommended that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and that such costs be made payable in accordance with Business and Professions Code section 6140.7 and as a money judgment.

VI. Order Sealing Documents

In the course of determining respondent's eligibility for participation in the ADP, and while respondent was participating in the ADP, various documents were submitted to the court for review under confidential cover, including reports and evaluations by mental health professionals and respondent's recommended treatment for participation in the LAP. Pursuant to Business and Professions Code section 6234, subdivision (a), and rule 806 of the Rules of Procedure of the State Bar of California, all information concerning the nature and extent of a respondent's treatment is absolutely confidential and is not to be disclosed to the public absent an express written waiver by the respondent.

ACCORDINGLY, the court orders this Order Sealing Documents be filed. Thereafter, pursuant to rule 806(c) of the Rules of Procedure, all other documents not previously filed in this matter will be sealed under rule 23 of the Rules of Procedure.

FURTHERMORE, the following documents are to remain confidential and sealed:

1. All reports and evaluations by mental health professionals that were submitted to the court as part of respondent's participation in the Alternative Discipline Program;
2. All information concerning the nature and extent of respondent's treatment provided by the LAP, including, but not limited to, participation reports, application agreements and participation agreements; and
3. The Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program.

IT IS FURTHER ORDERED that the foregoing protected and sealed material will only be

disclosed to: (1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the State Bar Court and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their official duties. Protected material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosure. All persons to whom protected material is disclosed will be given a copy of this order sealing the documents by the person making the disclosure.

IT IS SO ORDERED.

Dated: July 17, 2007

PAT McELROY
Judge of the State Bar Court